United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7184-85

ORIGINAL

To be argued by
WILLIAM F. McNULTY

B

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC. and HENRY GIRDWOOD,
Defendants-Appellants-Appellees.
Action No. 1.

ANGELA CHIARELLO,
Plaintiff-Appellee-Appellant,
against
DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,
and
HENRY GIRDWOOD,
Defendant.
Action No. 2.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF DEFENDANTS-APPELLANTS-APPELLEES AND BRIEF OF DEFENDANTS-APPELLANTS-APPELLEES, AS APPELLEES

DANIEL J. COUGHLIN
Attorney for Defendants-Appellants-Appellees in Action No. 1 and Defendant-Appellant-Appellee in Action No. 2
110 William Street
New York, N. Y. 10038
BE 3-5010

WILLIAM F. McNULTY,
ANTHONY J. McNULTY,
Of Counsel.

INDEX (TO REPLY BRIEF OF DEFENDANTS)

INDEX (TO BRIEF OF DEFENDANTS AS APPELLEES)

CASES CITED

United States Court of Appeals
FOR THE SECOND CIRCUIT

THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,

against

DOMENICO BUS SERVICE INC. and HENRY GIRDWOOD,
Defendants-Appellants-Appellees.

Action No. 1.

ANGELA CHIARELLO,
Plaintiff-Appellee-Appellant,

against

DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,

and

HENRY GIRDWOOD,
Defendant.

Action No. 2.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

Scope of Reply Brief

This Reply Brief is addressed solely to the portions of Plaintiffs-Appellees' Brief dealing with the order of District Judge Metzner setting aside the jury verdict in favor of Defendants-Appellants at the first trial of this action (Ptfs-App'lees' Br., pp. 10-24).

POINT I

Plaintiffs-Appellees' charge of distortion of Record, etc.

It is unfortunate that Plaintiffs-Appellees have seen fit to conclude the argument in support of their claim that the order of Judge Metzner setting aside the jury verdict in favor of the Defendants at the first trial of this action on a discordant note. We refer to the statement at page 24 of Plaintiffs-Appellees' Brief that "the defendants have distorted the record and set forth so many things that are seemingly not pertinent" that "their motives have become obscure and suspect" and that "In groping for an understanding, the only possible conclusion one could arrive at is that this appeal is frivolous; that it is being pursued because of a dispute that has arisen between the primary carrier and excess carrier of the defendants (see copy of report annexed hereto marked Appendix A which has been filed by the attorneys for the primary carrier in this appeal)," which they hope will "give them a basis for salvaging their position vis-a-vis the excess carrier, by reason of a claimed default under their contract" and that "This Court should not lend itself to such an intent or countenance same."

The report annexed to Plaintiffs-Appellees' Brief as Appendix A thereof is the Report signed by the writer of this Brief, as counsel for Defendants-Appellants and thereafter served and filed, as required by the Rules of this Court, following the Pre-Argument Conference before Mr. Fensterstack, the Staff Counsel of the Court, in which the primary liability insurance carrier for Defendants-Appellants, in a good faith effort to bring this drawn-out litigation to a conclusion, indicated its willingness to pay the full $500,000.00 amount of its primary liability insurance coverage in order to achieve this purpose—an offer which proved to be abortive only because the excess

liability insurance carrier declined to pay the difference between this amount and the total amount of the judgments herein, or any part thereof, under its excess policy. This offer never would have been made if Defendants-Appellants or their primary insurance carrier had the slightest inkling that it would later be used by Plaintiffs-Appellees or their counsel against them on the present appeals. Wholly apart from the impropriety of Plaintiffs-Appellees annexing this Pre-Argument Conference Report, which is not a part of the Trial Record in these cases, to their Brief herein, it is submitted that the attempt to use this Report on the present appeals constitutes a flagrant violation of the well settled rule that a settlement offer made in good faith by a Defendant may not later be used against said Defendant.

Except for the above comment, we are not disposed to dignify the charges of misconduct made at page 24 of Plaintiffs-Appellees' Brief by replying to them. The writer of the Brief of Defendants-Appellants, who will also be arguing their appeal herein, has been practicing in this Court since 1928 and, although he has argued many appeals before this Court during this 48-year period, this is the first time that an adversary has ever charged him with trying to mislead the Court by distorting the Record or with any other unprofessional conduct.

Whether or not he has been guilty of any impropriety in writing the Brief for Defendants-Appellants in the cases at bar is something that the Court itself can best determine after it has read the Record on Appeal herein.

POINT II

Regardless of the angle from which the proof adduced at the first trial of these actions is approached, the conclusion is inescapable that the issue of the defendants' negligence was essentially one of fact for the jury and that the jury's verdict in favor of the defendants on this issue was not "contrary to the weight of the evidence" in the commonly accepted meaning of that term.

It is submitted that the most that can possibly be said of the proof adduced by the parties at the first trial of these actions is that it was so evenly balanced that the jury could have rendered a verdict either in favor of the plaintiffs or in favor of the defendants. The jury, however, after carefully considering all the proof and weighing the probabilities of the situation, saw fit to find in favor of the defendants—which it was clearly the right or prerogative of the jury to do because, as pointed out in the Main Brief of Defendants-Appellants, this is why juries are usually demanded in cases of this type where the issue of the defendant's negligence is a close one.

In trying to demonstrate to this Court that the jury's verdict in favor of the defendants was in fact "contrary to the evidence", Plaintiffs-Appellants completely overlook or ignore several very important factors. For example, they argue, and then later repeat the argument for emphasis, that "There is no question of the credibility of a witness here" (Ptfs-App'lees' Br., pp. 11, 22). As this Court will see when it reads the Record of the first trial, many questions of credibility were presented which it was the function of the jury—and the function of the jury alone—to resolve. Aside from the speed at which it was claimed the Domenico bus was traveling at the time that Girdwood, the driver, applied the brakes, and the distance that the bus was then traveling behind the car of Chiarello, the

most important of these credibility issues was the condition of the roadway in the "dip" under the railroad trestle. This was a vital factor that the jury had to consider in arriving at its verdict. Girdwood testified that, when the bus reached this "dip", the roadway was "flooded", as a result of the heavy rainstorm that had stopped only a few minutes before the accident occurred, by a large pool of water about 25 feet long and from 6 to 9 inches deep (402a-403a). Although Chiarello sought to deny this (283a), the jury could readily have, and in all probability did, find that his denial that there was a large pool of water in the roadway at this point was incredible, since it is common knowledge that "dips" of this kind in a roadway are usually flooded with water right after a heavy rainstorm, regardless of the drainage facilities provided. If there was a large pool of water on the "upgrade" portion of the roadway beyond the "dip", which Chiarello himself claimed required the cars in front of him to stop (63a-64a), it is fair to assume that there was also a large pool of water in the "dip" under the railroad trestle, as Girdwood testified there was. In any event, it was competent for the jury to have so found.

According to Girdwood—who, as the Court will see when it examines the Record, appeared to be a very truthful witness—the water from this pool of water in the "dip" under the railroad trestle splashed up and entered the brake bands on the wheels of the bus, which later caused the wheels of the bus to "lock" when he applied the brakes (410a).

Girdwood testified that he was traveling "about 75 feet" behind Chiarello's car when he applied the brakes of the bus (409a) and at a speed of only "20 miles an hour" (410a). In this connection, it should be observed that Chiarello himself placed the bus much further behind his car than Girdwood did. When Chiarello was asked on direct examination "what distance this bus traveled from the time that you saw him coming out of the dip until he

hit you", he testified, "Between, I would roughly say, a hundred to 150 feet" (71a).

If the jury accepted the testimony of Girdwood as to the circumstances surrounding the occurrence of the accident herein—as it had a right to do—it is difficult to understand how anyone can seriously claim that its verdict in favor of Defendants was "contrary to the weight of the evidence".

No one, it is submitted, seems to appreciate this more than Plaintiffs-Respondents themselves, who argue at page 13 of their Brief:

> "The defendants make much of a story that the bus's wheels locked (or blocked as set forth in the EBT) in going through the puddle of water. If that were so, it even raises a question as to whether the vehicle was properly maintained and was suitable for use on that highway."

This so-called "story" of Girdwood was more than just a "story". It was sworn testimony adduced at the trial, which the jury was required to weigh and evaluate in order to determine how or why the accident herein occurred.

With respect to Plaintiffs-Appellees' claim that, if the jury accepted this testimony, it would raise a "question as to whether the vehicle was properly maintained and was suitable for use on that highway", it need only be said that no such question as this was raised at the trial or submitted to the jury. The only issue of negligence litigated at the trial or submitted to the jury was whether Girdwood was negligent in the operation of the bus (592a). The jury at the first trial resolved this factual issue in favor of the Defendants and, it is submitted, the Trial Judge erred in setting aside the jury's verdict on the claimed ground that it was "contrary to the weight of the evidence", which, for the reasons hereinabove set forth, it is submitted it clearly was not.

It is the contention of Defendants-Appellants that if the order of Judge Metzner setting aside the jury verdict in their favor at the first trial on the alleged ground that it was "contrary to the weight of the evidence" is affirmed by this Court, then in any closely contested negligence action, the Trial Justice would be justified in substituting his judgment for that of the jury if he was sympathetic to the injured plaintiff.

Plaintiffs-Respondents further argue at page 15 of their Brief that because the Trial Judge rejected certain of their requests to charge, "It would appear that in the interests of justice the Court, for this reason alone, should have set aside the verdict and ordered a new trial and had the Court not taken such action plaintiffs would have appealed and this Circuit Court would have ordered a new trial because of the omission to charge the applicable law." Since the verdict of the jury in favor of the defendants was not set aside on any such ground as this, the question of whether or not the Trial Judge erred in refusing to grant the plaintiffs' requests to charge is not before this Court on the present appeals. Furthermore, the conclusion of Plaintiffs-Appellees' counsel that, in the event an appeal was taken by them, this Court "would have ordered a new trial because of the omission to charge the applicable law" is based upon nothing more substantial than pure speculation or wishful thinking.

At pages 11 and 12 of their Brief, Plaintiffs-Respondents take counsel for Defendants-Appellants to task because they have not only allegedly "misinterpreted" the finding of Judge Metzner that the "Situation was just too close" to permit the verdict of the jury in favor of the defendants to stand, but because "they repeat and reiterate such misleading interpretation as to befuddle and confuse the issue" and "distort" the meaning of the finding, as well as the further finding of the Trial Judge that "because of the narrow tolerances, we cannot with accuracy plot what happened"

(644a). This is precisely what Judge Metzner himself said in his order setting aside the verdict of the jury in favor of the defendants at the first trial, and if he did not mean what he said, then counsel for Defendants-Appellants can hardly be criticized for taking the Court's own language at its face value.

Finally, at page 23 of their Brief, Plaintiffs-Appellees complain because "defendants' brief contains a number of pages setting forth their version of the testimony in the second trial with respect to liability" (Defts-Apps' Br., pp. 19-26). We agree with counsel for Plaintiffs-Appellees that the testimony on the liability issue adduced at the second trial of these actions is "irrelevant" to the issue raised by the appeal from the order of Judge Metzner setting aside the jury verdict in favor of the defendants at the first trial. The only reason that this testimony was set forth in the Main Brief of Defendants-Appellants was to show this Court that it was substantially the same as the testimony adduced at the first trial, yet the jury at the second trial arrived at an entirely different verdict than the one reached by the jury at the first trial, thus demonstrating that in a case where the issue of liability is as close as it was in the cases at bar two different juries can easily reach entirely different verdicts on substantially the same evidence. This, however, does not prove that either verdict was "contrary to the weight of the evidence".

The injuries claimed by the plaintiff, Thomas C. Chiarello, were serious and the loss of services claim of his wife was substantial. In the absence of any clear showing —and, it is submitted, there is no such showing in the Record presently before this Court—that the verdict of the jury in favor of the defendants at the first trial of these actions was "contrary to the weight of the credible evidence," this was no legally justifiable reason why the plaintiffs should have been afforded any opportunity to try their cases a second time before a second jury.

As heretofore stated, the most that can possibly be said of the liability proof adduced at the first trial of these actions is that it was so close that the jury could have found either in favor of the defendants or in favor of the plaintiffs without incurring the risk that its verdict would be set aside on the ground that it was "contrary to the weight of the evidence."

We know of no case which holds, or even suggests, that where the liability proof adduced at the trial of a negligence action is so close that the jury can find either in favor of the defendants or in favor of the plaintiffs, the Trial Judge has any power to set aside the verdict of the jury on the alleged ground that it is "contrary to the weight of the evidence", and Plaintiffs-Appellees themselves cite no such case in their Brief.

United States Court of Appeals
FOR THE SECOND CIRCUIT

THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,

against

DOMENICO BUS SERVICE INC. and HENRY GIRDWOOD,

Action No. 1.

ANGELO CHIARELLO,
Plaintiff-Appellee-Appellant,

against

DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,

and

HENRY GIRDWOOD,
Defendant.

Action No. 2.

BRIEF OF DEFENDANTS-APPELLANTS-APPELLEES, AS APPELLEES

Issue Raised by Cross-Appeal of Plaintiffs

The sole issue raised by Plaintiffs on their cross-appeals herein concerns the discounting of the gross awards which the jury at the second trial made to Chiarello for future

pain and suffering and to his wife for future loss of consortium. Plaintiffs claim that District Judge Metzner erred in discounting or reducing each of these two gross recoveries to their "present value" (Ptfs-Apps' Br., pp. 35-40).

FIRST POINT

The Trial Judge properly discounted the gross jury awards made for the future pain and suffering of Chiarello and for the future loss of consortium of his wife.

It is the contention of Plaintiffs on their cross-appeals herein that, although District Judge Metzner properly discounted the gross jury award made to Chiarello for future loss of earnings, it was improper for him to do so in the case of the gross awards made to Chiarello for future pain and suffering and to his wife for future loss of consortium. Although the plaintiffs claim that, under the "present value" rule of an award for future damages, a distinction should be made between an award covering future loss of earnings and awards covering future pain and suffering and future loss of consortium, we can perceive none. All three of these awards result in the present "lump sum" payment of damages which accrue in the future and, in most instances, over a period of many years. If it is fair and equitable to discount or reduce to its "present value" a gross award made for future loss of earnings, there would appear to be no reason in logic or justice why gross awards for future pain and suffering or future loss of a wife's consortium should be treated otherwise.

Chesapeake & Ohio Ry. v. *Kelly,* 241 U.S. 485, cited at page 37 of the Brief of Plaintiffs, did not even involve the question of discounting gross awards for future pain and suffering or future loss of consortium. The issue before the Supreme Court in that case, which was a wrongful death action arising under the Federal Employers' Liabil-

ity Act, was whether the gross award made for the "pecuniary" loss sustained by the next of kin of the decedent should be discounted. In reversing the holding of the Court of Appeals of the State of Kentucky that it should not be discounted, the Supreme Court merely held at page 493 of its opinion that "where future payments are to be anticipated and capitalized in a verdict the plaintiff is entitled to no more than their present worth, is commonly recognized in state courts", although the state court decisions on this point are "not harmonious, and some of them may be subject to question."

Sea-Land Services, Inc. v. *Gaudet,* 414 U.S. 573, a wrongful death action involving a longshoreman, also cited at page 37 of the Brief of Plaintiffs, likewise did not involve the issue presently before this Court.

In *Yodice* v. *Koninklijke* v. *Nederlandsch Stoomboot Maattschappij,* 443 F. 2d 76 (2 Cir., 1971), cited at page 38 of the Brief of Plaintiffs, which was a longshoreman's personal injury action, the defendant requested the Trial Court to charge the jury that any award it made for future loss of earnings or pain must be discounted to present value at a rate which, under today's conditions, should not be less than 5%, but the Court refused to so charge. This Court merely held that, "Except for the point that an award for pain and suffering need not be discounted when it is in the form of a lump sum, see *Rapisardi* v. *United Fruit Co.,* 441 F. 2d 1308, 1312, N/7. (2 Cir. 1971), both requests were in line with so many familiar and controlling decisions that extended citation would be supererogatory." The Court, however, did not hold that in a proper case it would be error for the Trial Judge to discount a substantial gross jury award for future pain and suffering. At least, we can find nothing in the Court's opinion in the *Yodice* case to indicate that it intended to go as far as this. In *Rapisardi* v. *United Fruit Co., supra,* the recovery there involved was not for future pain and suffering

in the commonly accepted sense of the term but for so-called psychological trauma allegedly resulting from the plaintiff's fear that his injuries would render him unemployable in the future.

In *Ressler* v. *United States Lines Inc.*, 517 F. 2d 579 (2 Cir., 1975), cited at page 38 of the Brief of Plaintiffs, which was a Jones' Act case for maintenance and care, the issue before the Court was the adequacy of the awards allowed the plaintiff for present and future loss of earnings and for present and future pain and suffering.

Finally, at pages 39-40 of their Brief, Plaintiffs rely heavily on the decision of the Supreme Court of New Jersey in *Botta* v. *Brunner*, 26 N.J. 82, where the issue before the Court was the use by the plaintiff's counsel of a mathematical formula for determining the amount of his client's future pain and suffering and inconvenience in a personal injury action. In a lengthy opinion the New Jersey Supreme Court properly condemned this practice on the ground that damages of this type are incapable of determination on the basis of any mathematical formula.

In *Drlik* v. *Imperial Oil Limited*, 114 F. Supp. 388, 394, the District Court for the Northern District of Ohio discounted an award for future pain and suffering and, although the Court of Appeals in the Sixth Circuit on appeal found that the award for future loss of earnings was excessive and modified the judgment appealed from accordingly, it did not disturb this portion of the judgment.

It is submitted that the circumstance that it is difficult to measure future pain or suffering or future loss of consortium in terms of dollars and cents and that any award for these items of damages is of necessity speculative constitutes no ground for holding that, when such awards are made by the jury, they should not be discounted or reduced to their "present day" value just as awards for future loss of earnings are.

The only difference between lump sums presently awarded for future pain and suffering or for future loss of consortium and lump sums presently awarded for future loss of earnings is that the amount of the former is more difficult to ascertain than the latter. In both cases, however, the plaintiff is being presently compensated for damage that he or she will sustain in the future and which, in fairness to the defendant when the award is a substantial one, therefore should be discounted or reduced to its "present value". If a gross award for future pain and suffering or for future loss of consortium is not so discounted, the person receiving such an award clearly will be overly compensated for his or her injury.

In the cases at bar the gross award made by the jury to Chiarello for future pain and suffering was $230,000.00 and the gross award made to his wife for future loss of consortium was $70,000.00 (1428a, 1435a)—both very substantial sums of money, which, if they are not discounted or reduced to their "present value", clearly will result in the unjust enrichment of the Plaintiffs at the expense of Defendants.

It is the contention of Defendants on these appeals that, absent some clear and conclusive Federal authority that District Judge Metzner erred in discounting the gross award made by the jury to Chiarello for his future pain and suffering and the gross award made by the jury to Mrs. Chiarello for her future loss of consortium, the order of the Trial Judge now complained of should be affirmed.

CONCLUSION

The order of the District Court discounting the g. awards made by the jury for future pain and suffering and for future loss of consortium should be affirmed, with costs.

Dated: New York, New York, August 17, 1976.

Respectfully submitted,

DANIEL J. COUGHLIN,
Attorney for Defendants-Appellants-Respondents.

WILLIAM F. MCNULTY,
ANTHONY J. MCNULTY,
Of Counsel.

Services of three (3) copies of
the within
is
hereby admitted this
day
of
, 197

Attorney for

8-20-76

COPY RECEIVED
ZIMMERMAN & ZIMMERMAN